

REMARKS

The Advisory Action dated July 27, 2009 indicates that the 1.132 Declaration of Julia Hwang (the “Declaration”) “will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented.” Reconsideration is respectfully requested in view of the following remarks.

Applicants remind the Examiner that “evidence traversing rejections, when timely presented, must be considered by the examiner whenever present.” MPEP 716.01. The Declaration submitted by Applicants with the Response Pursuant to 37 C.F.R. §1.116 dated July 16, 2009 (the “Response”) was timely presented. The MPEP provides that “[a]ffidavits and declarations submitted under 37 CFR 1.132 and other evidence traversing rejections are considered timely if submitted [...] after final rejection [...] upon a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented in compliance with 37 CFR 1.116(e).” MPEP 716.01 Therefore, a Declaration presented after a final rejection must be considered by the Examiner upon a showing of good and sufficient reasons why the Declaration was not presented earlier.

Applicants previous Response made a showing of good and sufficient reasons why the Declaration was not presented earlier. Applicants submitted the Declaration to traverse a rejection first made by the Examiner in the immediately preceding final Office Action. In the Response accompanying the Declaration, Applicants respectfully requested that the Declaration be entered because “the Examiner’s rejection necessitated the submission of the Declaration, the Declaration plainly could not have been presented earlier.” Response at page 2. Applicants reiterate that it would have been impossible to submit a Declaration traversing a rejection before that rejection had been made by the Examiner.

The Declaration was therefore timely, as required by 37 CFR 1.116(e) and MPEP 716.01. Accordingly, the evidence presented in the Declaration must be considered by the Examiner. By failing to do so, the Examiner oversteps his authority. Applicants should not be required to submit a Request for Continued Examination to have the timely filed Declaration considered.

Accordingly, in view of the Declaration, Applicants submit that the Examiner's rejection pursuant to 35 U.S.C. §102(e) is improper and must be withdrawn. Furthermore, Applicants' previous Response fully addressed all the Examiner's remaining rejections. As previously indicated, Applicants will file appropriate terminal disclaimers to overcome any remaining non-statutory obviousness-type double patenting rejections, if so warranted. Therefore, as the Advisory Action fails to indicate that any of the claims remain rejected for any reason other than the failure to enter the Declaration, Applicants submit that all pending claims are now in condition for allowance, and allowance thereof is respectfully requested. The Examiner is encouraged to telephone the undersigned attorney for Applicants if such communication is deemed to expedite prosecution of this application.

Dated: *JULY 27, 2009*

Respectfully submitted,

By: 

George A. Xixis
Registration No. 38,664
NUTTER MCCLENNEN & FISH LLP
World Trade Center West
155 Seaport Boulevard
Boston, Massachusetts 02210-2604
(617)-439-3746
(617)-310-9746
Attorney for Applicant